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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

FOREWORD

The Commissioner's statement of the issue begs the question and his argument proceeds from a false premise to an untenable conclusion which would be no less untenable were his premise true. He grossly misconceives the legislative history, and in the guise of "reason", he imputes to the Congress a purpose and intent which fly in the teeth of what was said and done

at the time by Administration and Congressional sponsors of the bill. Neither last nor least, he espouses a doctrine, both novel and dangerous, upon which, in the final analysis, he is forced to rely, that the authority of an administrative agency is not measured by the powers granted to it by the Congress, but rather by the powers not expressly withheld.

We do not believe that the Administration and Congressional sponsors of the bill were either incompetents or cynics: We believe that they knew and truly said what their objectives were and how the bill would achieve them. We believe that the language of the bill as enacted into law, on analysis, is clear and unambiguous in carrying out what its sponsors intended. No "reasonable" assumptions drawn from thin air, no semantic jugglery and no missfatement of the issues or misconception of the legislative history, can refute the facts, redo the language, remake the issues, or rewrite the legislative history.

These are not mere hollow words, as an examination of what the Commissioner has said[1] will demonstrate.

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[1] The Commissioner's reply to our main brief is contained only partially in his brief in this case, for at page 12 of his brief he incorporates by reference the arguments made by the Government in its brief in the *Allen-Bradley* case, No. 78, this Term. Accordingly, we must refer to both briefs: References to the Commissioner's brief in this case are indicated by "Resp. B.", and references to the Government's brief in *Allen-Bradley* by "Govt. B.".

ARGUMENT

POINT I

CONTRARY TO THE COMMISSIONER'S ASSUMPTION BOTH IN HIS STATEMENT OF THE QUESTIONS PRESENTED AND IN HIS ARGUMENT, THE STATUTE AUTHORIZED CERTIFICATION OF, AND THE BOARD CERTIFIED, "FACILITIES" AND NOT "COSTS".

A. Power to certify parts of facilities is not power to certify costs.

The Commissioner says (Resp. B. 2) that the first issue is whether the Board

> had authority to certify only part of the cost of a new facility.

This clearly begs the question, for it necessarily assumes that the Board certified, and under the statute was to certify, "cost" as being necessary in the interest of national defense. But, as we have pointed out in our main brief (pp. 30-47) and as the certificates actually issued in this case witness (R. 8A, 8B), what the statute prescribed, and what the Board issued, were certificates that "facilities", not "costs", were necessary in the interest of national defense. The distinction is clear and the Commissioner's plight is obvious. For, if under the statute the Board's certificates were to relate to "costs" as being necessary in the interest of national defense, it is comparatively easy to justify, superficially at least, the certification of only the "war-induced" part of cost. But, if under the statute the Board's certificates were to relate to "facilities", rather than "costs", as being necessary in the interest of national defense, an administrative limitation on the statutory effect of the certificate to only the "war-induced" part of the cost of a certified facility cannot, as shown in our main brief (pp. 25-47), be justified even superficially.

The wholly false premise that "costs" rather than "facilities" were the subject of certification under the statute underlies the whole of the Commissioner's substantive argument. Throughout his briefs we find such phrases as: "only part of such *cost* was certified", "only part of the *cost* of a new facility was necessary", "only part of the *cost* of an emergency facility was certified as necessary", "certification of full *cost*", etc., etc., etc. (see, e.g., Resp. B. 7, 11, 12, 17; Govt. B. 7, 8, 12, 18). The falsity of his premise leads the Commissioner into curious paths. Thus, he says (Resp. B. 13):

> Where there were "facilities of a size or capacity greater than was necessary in the interest of national defense, or where the facilities certified were to be used only partially for defense production", the taxpayer recognizes that partial certificates were issued, and were contemplated by the applicable, contemporaneous Treasury Regulations. (Br. 46.) But, the taxpayer argues, partial certificates in these situations were different from partial certificates which were designed to preclude amortization of a portion of the costs of facilities which would have a post-war use. (Br. 46-47.)
>
> But, once it is admitted that Section 124 is broad enough to empower the Board to issue some kind of partial certificates, it follows that it had authority to issue partial certificates in any situation, for there is nothing in the statute which draws the distinctions being made by the taxpayer or which authorizes the issuance of partial certificates in some situations and denies it in others. Indeed, the Board's authority to issue a partial certificate in any situation would have to come from the "only so much of" phrase of Section 124(f).

The sheer absurdity of this argument and the conclusion reached is manifest from the very language of the statute itself, which *expressly* authorizes the certification of *part of a facility*. Thus, section 124(e)(1) provides:

> As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, *or part thereof*, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * * (Emphasis supplied.)

Clearly, the Commissioner's assertion that "the Board's authority to issue a partial certificate in any situation would have to come from the 'only so much of' phrase of Section 124(f)" is completely without basis.

Obviously, the "partial certification" contemplated by the statute is the certification of a part, say, of a plot of land, sufficient, but no more than sufficient, for the needs of a necessary plant; of a part, say, of a building, sufficient, but no more than sufficient, for the installation of a necessary production line; of a part, say, of an aggregation of machinery and equipment, sufficient, but no more than sufficient, for the production of necessary materiel. Partial certification contemplates the certification of the necessary, and noncertification of the unnecessary;[2] certification of the essential item and noncertification of the luxury item.[3]

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[2] E.g., in a manufacturing plant machine tools would be necessary, but an office air conditioning system would not be (R. 35-36).

[3] "* * * electric signs, glass desk tops, ping pong tables, pool tables, and soda fountains * * *" (R. 35).

To say that the statute contemplated that "partial certification" was to be in terms of cost is sheer distortion of the plain language of the statute.

B. The effect of amortization upon the revenues is not relevant to the issues here.

A constant theme of the Commissioner is the supposed cost to the Government of the amortization program considered in terms of "lost" revenue in general and in respect of particular taxpayers.[4] Thus, the Commissioner says (Govt. B. 18) that:

> * * * Where the construction of the facilities was financed by private funds, the granting of rapid amortization had the effect of *indirect* government financing to the extent that a corresponding reduction in taxes was achieved during a period when a high tax rate was being imposed. * * *

and (Govt. B. 19) that:

> Although the amortization provisions were nominally a part of the revenue laws, the function of determining what facilities should be entitled to receive the benefits of the statute was delegated to the executive officials primarily responsible for controlling the development of the defense program, presumably on the theory that they were best able to weigh the necessity of particular facilities in the light of all surrounding circumstances, including the cost to the Government resulting from certification. * * *

Of course, the over-all effect of the amortization scheme would have been to reduce tax revenues below

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[4] In our main brief, pp. 47-52, we attempted to place this subject in proper perspective by orienting attention to the circumstances surrounding the enactment of the statute.

what they might have been *if* the same facilities had been built without it, *if* those facilities had produced the same profits and *if* the same tax rates had applied to those profits. On this "iffy" assumption of constant factors, amortization can of course be made to appear as a drain upon the revenues. But can it be fairly assumed that without amortization, the same plants would have been built, the same profits would have been earned, and the same tax rates would have been applied? Clearly not, for as we pointed out in our main brief (pp. 47-52), the amortization provisions of the Internal Revenue Code were enacted for the express purpose of overcoming the unwillingness in 1940 of private enterprise to risk the tremendous investment required to create the enormous additional productive capacity so urgently needed then, but whose post-war usefulness was at best dubious.[5] Moreover, is it not also fair to conclude that the amortization scheme, which helped bring about the tremendous industrial expansion which eventually made possible the winning of the war, thereby was itself an important factor in the amazing productivity of the wartime tax structure?

Furthermore, from the vantage point of 1956, it may seem at first glance that the "cost" to the Government, of any particular facility, in terms of lost revenues because of the availability of amortization deductions, might have been estimated with fair accuracy at the time application was made for a certificate. The contrary is the fact.[6] A certificate did

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[5] See, e.g., H. Rept. No. 2333, 76th Cong., 3d Sess., p. 16, quoted at p. 50 of our main brief. See also pp. 40-43, *infra*.

[6] Consider: This case involves the income and excess profits tax liability of the National Lead Company for the calendar years

not guarantee, or limit, either the cost of the plant or the cost of manufacture; a certificate did not guarantee a market, or a price; in short, a certificate was no assurance of profits, and did not, willy-nilly, affect tax liability. With all the uncertainties that necessarily prevailed, any estimate of the future income and future tax liability of any particular taxpayer,[7] much less with respect to any particular facility, was a virtual impossibility; yet nothing less would have permitted even a guess as to the "cost" to the Government of the certification of a facility.

It is true that at the outset, Congress incorporated into section 124 a provision designed to protect the

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1941-1944. Some $6,000,000 or more in claimed deficiencies and overpayments for those years were in issue before the Tax Court. One of those issues is now, in late 1956, before this Court. How could the War Production Board, no matter how able its staff, have fairly estimated, in 1944, the "cost" of the facilities here involved in terms of "lost" revenues?

[7] The Commissioner cites an example of the possible loss of revenue in the case of a facility having full post-emergency utility (Govt. B. 28, n. 12). Under the assumed facts, the "loss of revenue" would be $450,000. But, the coin has another side.

For simplicity, we assume, as does the Commissioner, that the maximum tax in the five-year emergency period was 85%, and that the facility has a 20-year life. But it must be remembered that the World War II corporate normal tax rate was 40%, and that the post-war tax rate has not been 25%, as the Commissioner seems to suggest, but 38% in 1946-1949, and 52% since 1950 (with an additional 30% excess profits tax in 1950-1953, where applicable).

Corporations which did not pay excess profits taxes in World War II were not rarities. Moreover, many of them received and took advantage of necessity certificates, for the decision as to whether or not to do so had to be made then. Such a corporation would have yielded to the Treasury at least $62,000 more in aggregate tax revenues, over the 20 years of the facility's life, by electing to take amortization deductions, rather than relying on normal depreciation.

financial interest of the Government in each facility. This was section 124(i), relating to nonreimbursement and Government protection. This scheme proved unworkable, and was repealed soon after Pearl Harbor (R. 30). The Commissioner points to no one, either in Congress or in the executive departments, who expressed the view that the cost of the program was to be controlled by certifying *costs* of facilities. It is, indeed, not too much to say that the cost of the program was considered by those charged with the responsibility in the premises as being wholly irrelevant to the need for the facilities. Yet, with all apparent seriousness, the Commissioner claims that it was "with this very cost in mind", that is, the cost of the amortization program in terms of lost revenues, that Congress enacted the Joint Resolution of October 30, 1941, amending section 124 of the Internal Revenue Code. The Commissioner argues (Govt. B. 10, 11):

> The view * * * that the certifying authority was required to issue 100% certificates or none at all is based on the premise that Congress intended that the cost of the certification program, in lost revenue, to the Government could not properly be taken into consideration in the issuance of necessity certificates with respect to post-1939 construction of emergency facilities. But it was with this very cost in mind that Congress amended the statute on October 30, 1941, to require the President's approval of regulations to be issued governing the issuance of necessity certificates, and the regulations so approved expressly provided for percentage certifications.

But the legislative history of the amendment flatly refutes the Commissioner's unsupported statement of its purpose. The amendment was of section 124(f)(1) which, as originally enacted, read:

> There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after June 10, 1940, as the Advisory Commission to the Council of National Defense and either the Secretary of War or the Secretary of the Navy have certified, within the time specified in paragraph (3) of this subsection, *and under such regulations as the President may prescribe,* as necessary in the interest of national defense during the emergency * * *; (Emphasis supplied.)

As noted in our main brief (p. 41, n. 16), one of the purposes of the October 30, 1941 amendment was to eliminate the Council of National Defense as a necessary co-certifying agency with the War or Navy Departments, as the case might be. In explanation of the amendment as originally introduced in the House of Representatives, the House Ways and Means Committee said in its Report (H. Rept. 1207, 77th Cong., 1st Sess.):

> Section 1 of the joint resolution proposes to strike out the requirement in the existing law that the Advisory Commission to the Council of National Defense act as a joint certifying agency for necessity certificates. When the present law was enacted, the Advisory Commission to the Council of National Defense was an active functioning body. At the present time, its other functions have been taken over by other governmental agencies. The War Department and the Navy Department are presently equipped to act upon applications for amortization privileges, and have secured the cooperation and assistance of other governmental agencies. Experience has shown that considerable uncertainty and delay is created by the necessity for joint action of two

governmental agencies in passing upon applications for certification.

In lieu of required action by the Advisory Commission, it is now proposed that certifications be made only by the Secretary of War or the Secretary of the Navy, as the case may be, but *under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy and subject to such policies and procedures as may be prescribed from time to time by the President or by such agency or officer as he may designate. It is thought that by this means control of the policy and procedure as to certification for tax purposes will be as effective as previously provided by requiring joint certification by the Advisory Commission with the Secretary of War or the Secretary of the Navy, but without the inherent delay resulting from duplication of effort by requiring in each case an agency outside of the Army or Navy to join in the certification.* (Emphasis supplied.)

The Senate Finance Committee, however, thought that the House provision was too clumsy and proposed (S. Rept. 688, 77th Cong., 1st Sess.) that the words "and subject to such policies and procedures as may be prescribed from time to time by the President, or by such agency or officer as he may designate", appearing after the words "under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy", be eliminated and that there be inserted in lieu thereof the words "with the approval of the President". In explanation, the Senate Report said:

In lieu of required action by the Advisory Commission, it is now proposed that certifications be made only by the Secretary of War or the Secre-

> tary of the Navy, as the case may be, but under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy. Under the House language, such regulations were to be subject to such policies and procedures as may be prescribed from time to time by the President or by such agency or officer as he may designate. * * * your committee, *in the interest of simplification, struck out the House provision and amended the resolution to provide that such regulations shall be subject to the approval of the President. It is thought that by this means control of the policy and procedure as to certification for tax purposes will be as effective as previously provided by requiring joint certification by the Advisory Commission with the Secretary of War or the Secretary of the Navy, but without the inherent delay resulting from duplication of effort by requiring in each case an agency outside of the Army or Navy to join in the certification.* (Emphasis supplied.)

We fail to see how this amendment (the Senate version prevailed) has any relation to "this very cost" (Govt. B. 11), as the Commissioner calls it, or confirms, as the Commissioner says, that "Congress intended to confer a wide latitude of administrative discretion" (Govt. B. 38), for most agencies can promulgate regulations without the approval of the President. Indeed, the Congressional comments cited by the Commissioner (Govt. B. 39) confirm that it was the purpose of Congress not to give the certifying agencies latitude, but to keep them quite firmly in check. Moreover, it is clear that the amendment added nothing to the power of the executive to promulgate regulations under the act, merely substituting as it did the Secretary of War and the Secretary of the Navy, with the approval

of the President, as the rule-making authority, in the place of the President.

Any faithful presentation of the legislative history,[8] will demonstrate that in enacting the amortization provisions of the Internal Revenue Code, nothing but the success of the defense program, in terms of getting

[8] Just as he misconceives the legislative history and misunderstands the Congressional purpose, the Commissioner "interprets" out of all recognition the purport of the Treasury Regulations. Of those Regulations (Sec. 19.124-6, Reg. 111, printed at pp. 77-79, Appendix A, Govt. B., which replaced Sec. 19.124-6, Reg. 103, without substantive change), the Commissioner says (Govt. B. 37):

> The contemporaneous administrative construction of the statute shows an understanding of the legislation which is completely at variance with that of the [Court of Claims]. * * * Section 19.124-6 * * * explicitly demonstrated that the adjusted basis for the amortization deduction would not only be limited to the portion of the basis attributable to construction after June 10, 1940 * * * but would be further limited if the appropriate officials "certif[y] only *a portion of the construction* * * * *".* Two examples given in the Regulations made it crystal clear that such a dual limitation existed and that, *even as to post-[critical date] costs,* only a portion might be certified * * *. (Emphasis supplied.)

The examples in the Regulations speak plainly of one certificate covering "the entire construction" after the critical date, and another covering "50 percent of the construction". So again, as so often in examining the Commissioner's argument, we must remind ourselves that the ordinary and accepted meaning of words is apparently not his. In his lexicon, "construction" and "cost" are synonymous and interchangeable, and that is enough; therefore when the Treasury Regulations speak of "portion of construction" they mean, of course, "portion of cost".

Similarly, the Regulations promulgated by the certifying agencies constantly refer to facilities, to their necessity, and to their certification. None of those Regulations support the thesis that costs were to be, or were being, certified.

the necessary facilities built and in operation, was the Congressional purpose.[9] None of the Administration or Congressional leaders who sponsored the act and the amendments thereto was, as Washington Irving said of William the Testy, "so intent upon guarding the national pocket * * * that * * * whatever precaution for public safety he adopted, he was so intent upon rendering it cheap, that he invariably rendered it ineffectual". *Knickerbocker History of New York,* Chap. IV.

C. The early regulations do not support the Commissioner.

The Commissioner appears somehow to find comfort and support for his views as to the purpose, meaning, and effect of the October 30, 1941 amendment in early regulations adopted thereunder (Govt. B. 11) and points (Govt. B. 40) specifically to Section 5 of the War and Navy Department regulations of June 4, 1942, approved by the President, providing as follows:

> 5. *Effect of Necessity Certificate.*
>
> a. *General Rule.* A necessity certificate is conclusive evidence of certification by the certifying authority that the facilities therein described are necessary in the interest of national defense, up to the percentage therein designated of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof after June 10, 1940.

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[9] Concededly, of course, Congress was at the same time concerned with unusual profits which would be occasioned by the war, but it dealt with this problem by enacting the excess-profits tax. It is significant that the excess-profits tax amendment and the amortization amendment to the Internal Revenue Code were dealt with by the Congressional committees concerned as a "package", and both were included in the Second Revenue Act of 1940. See our main brief, pp. 47-52.

This, the Commissioner maintains (Govt. B. 40), is

> express recognition that the statute entrusted authority to certify only a percentage of the cost attributable to construction after the critical date * * *.

Taken literally, the Commissioner's contention is largely unobjectionable. For, as we have seen, under section 124(e)(1), set out at p. 5, *supra,* the certifying agency could properly certify as being necessary *only part of a facility* where, for example, the facility as a whole was excessive in size, capacity, or adornment, or only part thereof was intended for war production. With section 124(e)(1) in mind (and it is clear that the Commissioner overlooked it, see pp. 4, 5, *supra,* and pp. 19-21, *infra*), it becomes at once apparent that the language of the regulation, and of those that followed it *in haec verba,* means no more than that in such a case of partial certification, the certifying agency would indicate on the certificate the percentage of the cost[10] of the whole facility that was "properly attributable", within the meaning of section 124(f)(1), to that part of the facility found to be necessary and that the facility was to be deemed to have been certified to that extent. Thus, Under Secretary Patterson posed the example (R. 38):

> In an early case, a building had been erected to produce 70% peacetime products and 30% war products. A 30% certificate was granted.

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[10] As we pointed out in our main brief, p. 30, "cost" and "adjusted basis", the term used in section 124, were in most cases, as in this, the same. In any event, "cost" is the basic element in determining "adjusted basis". See section 113 of the Internal Revenue Code of 1939.

We take the example to mean that 30% *of the facility* was determined to be necessary in that case. If the determination made was that an undivided (or unidentified) 30% *of the facility* was necessary, it might be perfectly natural to attribute 30% of the cost of the whole to the necessary part. But the per-unit cost of productive capacity does not always vary in direct proportion to increased capacity. In such a case as, for example, where 30% of the capacity of a facility was necessary, but only 20% of the cost of the whole facility was "properly attributable" to that capacity, a certificate reading "up to 20% of the cost", etc., would merely be a convenient and realistic means of reflecting the certifying agency's effective determination.

But, whatever purpose the clause in question was intended to serve when the 1942 regulations were promulgated, it was not to reflect a Congressional mandate arising from the October 30, 1941 amendment to section 124(f)(1) that "the cost of the certification program, in lost revenue, to the Government * * * be taken into consideration in the issuance of necessity certificates" (Govt. B. 10). For, as we have seen, not only was there no such mandate, but there was not even the slightest suggestion of any such thought which, in any event, would have been wholly irrelevant to the circumstances, purposes, and nature of the amendment.

Nor did the clause in question reflect any understanding on the part of the Secretaries of War and the Navy, or the President, that the statute authorized the certifying agencies to limit the amortization of the cost of a necessary facility having possible post-war usefulness to the percentage of cost attributable to excess war cost, if that is what the Commissioner would imply (Govt. B. 40, quoted p. 15, *supra*). This is

clear since the clause first appeared in June 1942, and certification on that basis was apparently first considered only sometime after October 8, 1943, when the Secretaries of War and the Navy, with the approval of the President, promulgated the last of their regulations referred to by the Commissioner (Govt. B. 21; R. 39, 40) which did not provide for such certification, and prior to February 9, 1944, when, after the intervening transfer of the certifying authority, the Board adopted the certification policy here in issue (see our main brief, pp. 25-27). But the problem which allegedly led to the adoption of the policy was already acute in the Spring of 1943 (Govt. B. 20; R. 38) and the Director of War Mobilization's solution of it, set out in the service departments' regulations of October 8, 1943, was that "further certification * * * should be made only in cases of facilities for a supply for military or naval uses, and then only after consideration of the relative advantage of governmental financing as against private financing with amortization" (R. 40). This was considered the alternative to abandoning the certification program altogether (R. 38-40). If partial certification in terms of excess war costs and post-war usefulness had been contemplated by the 1942 regulations, would it have been so long before such a program was adopted as a solution to the problem?

D. The Commissioner's interpretation, not the taxpayer's, leads to absurdity.

With a fecundity which is at once astounding and frightening, the Commissioner materializes a host of arguments, plausible enough syntactically, but which, on analysis, have neither logic nor reason, nor foundation in the statute. Thus, for example, he argues

(Govt. B. 33, 34) that if the Board did not have the power here contended for

> it would have no authority to limit the amount of cost which would become the basis for the amortization deduction. In other words, the Government would never have any assurance, once a certificate was issued, of what costs would become deductible through amortization.

But costs, except insofar as already expended, were of necessity in every case an unknown factor at the time of certification. Estimates had no binding quality. The Board did not pretend to issue certificates which purported to limit amortizable cost in terms of dollars and cents. The amount of amortizable cost necessarily remained unknown until the emergency facility was completed and its cost became a fact.

But this is not all. Certainly the Commissioner knows, as every schoolboy soon learns, that a percentage of an unknown amount is itself an unknown amount. Just how, then, the certification of a percentage of cost could have given the Government the assurance of which the Commissioner speaks must remain a mystery. Frankly, it is difficult to know what to make of this argument of the Commissioner, for the situation differs not a whit from that which surrounds the allowance for depreciation, with which the Commissioner is, of course, familiar. The cost to the Government of allowances for depreciation does, and must, remain unknown until the returns are in and the depreciable costs claimed have been checked and audited.

The Commissioner's claim (Govt. B. 33, 34) that the taxpayer's interpretation of the statute would lead

to absurd results is itself absurd. His hypothetical case of an application filed in 1943 for a plant estimated to cost $1,000,000, and certified "for 100% of cost, limited to one million dollars" (Govt. B. 33) posits an unreality. For, neither the War Production Board nor any of its predecessor certifying authorities ever undertook to control the *amount* of the cost of a facility[11] or to make a certification in terms of dollars and cents.

And again, when the Commissioner supposes (Govt. B. 34)

> a situation where, on the face of the application, it is clear that an indivisible portion of the plant will be useful for non-essential civilian production and that only the remaining indivisible portion will be useful for essential war production

he departs from reality. For while some facilities may be unitary and thus physically indivisible, no facility could possibly be indivisible in terms of size, capacity, or function; and there is no problem of "partial necessity" which could not have been resolved by certification of a part, a portion, a fraction, or even a percentage, of the facility.

The Commissioner's argument becomes confusion compounded when, in support of his thesis that in certifying a facility as necessary in the interest of national defense, the Board could limit the statutory effect of such certification to only the war-induced cost of the certified facility, he says (Govt. B. 34, 35):

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[11] As Under Secretary Patterson said: "The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to whether it was purchased or constructed for the lowest possible price * * *." (R. 36)

Congress could scarcely have desired that certificates of necessity should represent blank checks, with the taxpayer entitled to amortize full costs of construction, no matter how much they exceeded the prior estimates contained in the application for the certificate. And where the proposed facility was designed to produce, in part, items of absolute necessity to the nation's defense and, in part, unnecessary civilian items, it is difficult to believe that Congress desired either that the entire cost of the plant should be certified or that no certificate should be issued, with the consequence that the necessary part of the production might be unavailable from privately owned plants.

As for the first part of this argument: As already pointed out, the estimates given in applying for certificates were just that, estimates and nothing else. The Commissioner knows (or should know) better than anyone else, that amortization, like depreciation, pertains to actual costs, not estimated costs. Thus, if actual costs proved in a particular case to be less than estimated costs, the Commissioner would be far in the van in asserting that actual costs alone could be amortized. By the same token, if costs proved to be underestimated, it was nevertheless *cost,* not estimated cost, that was to be amortized. The fallacy of the Commissioner's argument is doubly emphasized when one recalls that while the general objective during the war was to "freeze" prices and wages, nevertheless, an essential feature of the control system was flexibility. The system had safety valves; when pressures became too great, the Government permitted both prices and wages to be adjusted upwards. Surely, taxpayers constructing necessary facilities were not to be bound by estimates made when one price and wage level prevailed, when the Government itself later

authorized the higher levels that were determinative of actual cost.

Moreover, if the amortizable amount is to be "estimated cost", not "actual cost", the pertinent provisions of the Internal Revenue Code lose their precision; taxpayers must tread a quagmire rather than firm ground. Section 124 provides for the amortization of "adjusted basis"; section 113 defines "adjusted basis" as "cost",[12] not "estimated cost"; and section 111 provides, for example, that taxable gain upon a sale of property shall be the excess of the amount received over the "adjusted basis". Does the Commissioner really mean to suggest that in section 124 "adjusted basis" means "estimated cost", and in section 113, "actual cost"? Would he maintain, also, that under section 111 gain or loss from the sale of a certified facility is to be computed from the starting point of estimated costs rather than actual costs?

The second part of the above-quoted argument has already been answered (pp. 3-6; 15, *supra*). It lies, in short, in the three words "or part thereof" contained in the pertinent language of the statutory definition of section 124(e)(1) of an emergency facility as

> any facility * * * *or part thereof* * * * with respect to which a certificate under subsection (f) has been made. * * * (Emphasis supplied.)

Accordingly, the strained and strange construction of the statute which the Commissioner contends for is not necessary even to avoid the horrible situations which he postulates.

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[12] Adjusted, as prescribed by section 113(b), in respects not material here.

POINT II

THE CONGRESSIONAL PURPOSE IN ENACTING THE AMORTIZATION SCHEME WAS TO FOSTER INDUSTRIAL EXPANSION BY GRANTING AMORTIZATION TO FACILITIES REQUIRED DURING THE EMERGENCY WHETHER OR NOT THEY MIGHT BE USEFUL THEREAFTER, AND NOT, AS THE COMMISSIONER CONTENDS, TO FACILITIES USEFUL *ONLY* DURING THE EMERGENCY.

A. In enacting the amortization provisions here involved, the Congress avoided the problem raised by the World War I provisions by eliminating all factors based on post-war utility and not by fixing the period, as the Commissioner claims.

The Commissioner asserts that in enacting the amortization provisions of the Internal Revenue Code, the Congress was concerned with usefulness *only* during the emergency. Thus, he says (Govt. B. 15):

> * * * plant facilities of the kind needed by the Government could be expected to earn income only during the emergency period * * *.[13]

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[13] See also Govt. B. 42, n. 19. The Commissioner's theory is, in effect, that since the normal cost of a facility having post-war utility will presumably be recovered by means of normal depreciation deductions, amortization was intended as a substitute, not for depreciation deductions covering the entire cost, but only for those deductions, equivalent in the aggregate to the "excess war cost", which normal depreciation deductions could not return to the taxpayer during the emergency. Consider this theory in application to land. Land, presumably, always has utility; in other words, there can be no doubt as to its post-war utility. But, the normal cost of land is never recoverable through depreciation deductions. If the allowable amortization was to be no more than a *pro tanto* substitute for *depreciation of excess war cost* the result would be no amortization for land, no matter how necessary in the interest of national defense, a result which would be contrary to the express provisions of the statute.

In a sense the Commissioner is right. The Congressional objective was to lessen the risks involved in building industrial facilities to produce items urgently needed for defense, and thereby to encourage the construction and expansion of facilities having usefulness *during* the emergency. But, whether such a plant or such expansion could, would, or might be useful or useless in the post-war period had no relevancy to the Congressional purpose. As we have already shown,[14] Congress intended that full amortization be available for facilities and parts of facilities needed for defense *whether or not* they might be useful after the war.

The Commissioner says (Govt. B. 44, n. 20) that Judge Miller, dissenting in the *Graphite* case, 176 F. (2d) 868 (1949),

> was undoubtedly correct when he stated that Congress, in enacting Section 124, wanted to avoid the problems encountered under the World War I amortization law.

The Commissioner concludes that the World War I problem was avoided by the World War II law.[15] With this generality we agree, but the Commissioner obscures the nature of the World War I problem and designates as the World War II solution, a feature of the law which was totally irrelevant to the problem and to its solution.

Let us examine this argument of the Commissioner. After conceding that Judge Miller was correct in stating the desire of Congress to avoid the World

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[14] See pp. 30-42 of our main brief.

[15] Govt. B. 44, n. 20.

War I problem, the Commissioner (Govt. B. 44, n. 20) proceeds:

> But he [Judge Miller] was not wholly accurate when he implied that the principal problem there encountered was that of taking into account the post-war value of facilities.

Can the Commissioner, whose predecessors suffered so with it, be heard to deny that post-war value was the "principal problem" under the World War I law?[16] Yet, he goes on—

> Rather the problem was that the 1918 statute, while based on a loss of useful value, did not prescribe the *amount* to be amortized in advance, and therefore great uncertainty prevailed * * *. (Emphasis supplied.)

Then we are told that the World War I defect of failure to prescribe the *amount* to be amortized in advance was corrected in the World War II statute by fixing a *period*:

> * * * it is generally agreed that this problem was avoided in the World War II statute by fixing an arbitrary maximum period during which the certified costs [sic] could be fully amortized.

Obviously, the World War I amortization law involved two factors. The first was, indeed, the "amount", that is, the portion of the cost attributable to the useful value lost by the ending of the emergency—and *that* was the troublesome problem indeed, involving as it necessarily did, post-war usefulness and value. The second factor was the "period". This was no problem, primarily because the war was already

[16] See the discussion of the World War I problem set out in Under Secretary of War Patterson's report at R. 23.

over when the law was passed. So, too, the World War II law involved two factors. The first was again the "amount", and this time the Congress solved that problem by prescribing that the "adjusted basis", i.e., the cost, of the certified facility or certified part of a facility could be amortized. The determination of the second factor, the period,[17] cannot conceivably be regarded as having solved the problem of "amount". What solved it was leaving out of the statute the uncertain post-war use element which was the troublesome factor under the World War I provisions.

Congress did not write the post-war use concept of the World War I law[18] into the World War II amor-

[17] The actual length of the period was to remain an open question until September 29, 1945.

[18] The late Randolph E. Paul, Special Tax Consultant to the President and the Treasury in the period 1937-41 and while the Second Revenue Bill of 1940, including its amortization provisions, was prepared, introduced, considered and passed, and General Counsel for the Treasury in the period 1942-44, clearly put the differences between the World War I and the World War II amortization provisions in his descriptions of them. Thus, in Paul, *Taxation in the United States* (1954) 119 he wrote:

> The 1918 act contained • • • [a] provision allow[ing] a deduction for amortization • • •. The fundamental theory of the amortization provision was that a taxpayer who enlarged plants, engaged in the production of war material and equipment at the high prices prevalent during the war, which plants or equipment would be more or less useless in the ordinary business, should not suffer from the necessity of paying a tax on income, the production of which required a substantial property investment at inflated prices.

Of the World War II Act, he wrote, *id.*, 264, that it

> allowed a deduction for income and excess profits tax purposes on account of the amortization of facilities certified • • • as necessary • • •. [It] permitted the write-off of the facilities over a period of sixty months instead of the longer normal depreciation period.

tization law, and the legislative history is clear that there was no purpose to do so (see our main brief, pp. 30-52). That ghost was raised, not by Congress, but by the War Production Board. In attempting to limit amortization in the case of facilities considered to have "post-war use", the Board disregarded the Congressional solution of the World War I problem, which was to eliminate the factor which gave rise to it, and undertook to inject into the administration of what was intended to be but a part of the normally matter-of-fact tax laws, an element of necromancy and clairvoyance. Obviously, "use" in "post-war use" must mean *economic* and not physical use (cf. Govt. B. 15), for it is difficult, if not impossible, to imagine anything ever having no use at all. Even after the glory that was ancient Rome's had failed, and the circuses and games were no more, the Colosseum served for centuries as a quarry whence came the foundation stones and walls of lowly hovels and proud palaces. But whether an emergency facility would have *economic* use in the post-war period necessarily depended on what economic conditions *would be* in the post-war period.[19]

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[19] The Commissioner says that (Govt. B. 23):

> • • • any facility with clear post-war value could, if Government-financed, be readily disposed of at the end of the war • • •.

This is typical of the fashion in which the Commissioner disposes of so many difficult problems. When would post-war value be "clear"—when the facilities were examined for certification; or after the war, when the nature and extent of post-war civilian demand could be equated with the capacity and function of the facilities, and all other like facilities? Moreover, how could anyone predict that a facility, if Government financed, could be "readily disposed of at the end of the war"? Does this mean that we were not to have, and did not have, after the war, any problem of surplus plant capacity in the hands of the Government?

Now, the Board may have been optimistic and its optimism may, on the whole, have been *proven* by future events to have been justified, but at the times when the policy was adopted and was being pursued, the future was far from clear. As we have shown in our main brief (p. 51), in October 1944 the President, in December 1944 the War Contracts Subcommittee of the Senate Military Affairs Committee, and in September 1945 the Senate Committee on Banking and Currency, publicly took dim views of the post-war economic period—*unless something were done to cause peace-time consumption to match war-induced capacities to produce.* And the "*unless*" continued to be an unknown quantity for some time. Suppose events had not taken the turn they did, or that our Administration and Congressional leaders had lacked the vision and the imagination to hitch the force of their turn to our economic mill wheel; then, of course, the Board's optimism might have proven wrong. Were the inducements to build and expand facilities to meet the demands of war, and the protection against the risk involved, which the statute held forth, to be granted or withheld only as the Board read its crystal ball? And if so, would the Board's attempted limitation of amortizable costs to war-induced costs on the ground of "post-war use" still hold if, as a matter of fact, the facility turned out to have no post-war economic use?[20] Certainly, neither such flimsy nor whimsey has any place in the law or its administration.

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[20] The amortization scheme made no provision for appeal and review, and no practicable system of review would have contributed to the objective of getting plants into production. It is one thing for the administrator to make final decisions as to necessity; it is quite another for him to make final decisions as to post-war usefulness and excess war costs. Simple fairness would demand reviewability of the latter.

B. The Board's power is to be measured by the authority granted by the Congress and not by the authority not expressly withheld, as the Commissioner claims.

But it is not necessary for the taxpayer to challenge the wisdom of the War Production Board's policy, any more than it is necessary for the Commissioner to defend it. Whether it was wise or not is not in issue. The issue is one of power. The power of an administrative agency is delineated by Congress, and only by Congress. An unwise decision does not lessen the power granted by the Congress to an administrative agency, nor does a wise decision generate power in an administrative agency where the Congress has granted none. These principles would appear to be elementary and fundamental. Yet, the Commissioner says that the power which the War Production Board assumed to exercise existed because (Govt. B. 28)—

> * * * Congress did not say that these agencies should be *precluded* from determining that only a part of the cost of a defense facility was "necessary in the interest of national defense". (Emphasis supplied.)

We do not believe that the power of an administrative agency is to be gauged by what Congress has not forbidden it to do, rather than by what Congress has authorized and directed it to do. As Mr. Justice Reed said for this Court in *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944):

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.

See also *Commissioner* v. *Gooch Milling & Elevator Company*, 320 U.S. 418 (1943).

POINT III

THE COMMISSIONER'S CONTENTION THAT THE WAR PRODUCTION BOARD DID NOT FIND THE TAXPAYER'S FACILITIES IN THEIR ENTIRETY TO BE "NECESSARY IN THE INTEREST OF NATIONAL DEFENSE" IS IN DIRECT CONTRADICTION OF HIS OWN CONSISTENT PRIOR POSITION.

While it is not easy to blow and swallow at the same time, to borrow Plautus' classical understatement (*Mostellaria,* Act III, Scene 2), the Commissioner seems to have achieved that impossible feat. Thus, when in *Ohio Power,* No. 312, last Term, the Government moved for leave to file a petition for rehearing of its petition for a writ of certiorari upon the ground, among others, that a petition for a writ of certiorari would be filed in this case by the taxpayer, the Ohio Power Company contended on brief (pp. 15-17) that the two cases were distinguishable and did not present a conflict, arguing:

> The key to the important differences between these two cases is found in two different bases on which the War Production Board acted in issuing necessity certificates containing a percentage limitation on amortization: (1) When the *capacity* of a proposed facility was in excess of that necessary to national defense, a percentage limitation was placed in the certificate in order to deny the right of accelerated amortization to the excess capacity of the facility (WPB Circular No. 33, Criteria for Preparation of Recommendations for Necessity Certificates, reprinted in Record on Petition for Certiorari in *United States Graphite Co.* v. *Sawyer,* No. 532, Oct. Term 1949, p. 85). (2) When the proposed facility was found necessary in its entirety to the national defense but it was reasonable to assume it would be useful also after the war, a percentage limitation on amortizable cost was placed in the certificate pursuant to the

Board's illegal policy of limiting amortizable cost to the excess cost of war-time construction or acquisition as compared with normal or pre-war cost (WPB Circular No. 33, *supra*, included in part at R. 28-29).

Thus, two distinct types of percentage certificates were issued by the Board, although on their face they may be and often were identical in language. In the instant case, as well as in *Wickes Co.* v. *United States*, 108 F. Supp. 616 (Ct. Cls., 1952), the taxpayers obtained written statements from the certifying agent that the 35 percent of cost limitation contained in their certificates was imposed solely pursuant to the Board's policy of limiting amortization to excess cost of war-time construction where the entire facilities were necessary to the war effort but were presumed to have post-war utility (R. 5-7, 27-29).

In the *National Lead* case, several certificates were involved, containing percentages varying from 35 to 50 percent (23 T.C. 988, at 1003). The record in *National Lead* fails to show what the percentages in those certificates represented. Without a statement from the certifying agent or other evidence as to the meaning of the percentages there is no proof that the Board ever determined that the entire capacity of the facilities was needed in national defense. Therefore, the Second Circuit properly predicated its decision on the fact that "the Board never determined that the facilities in question were necessary to the national defense in their entirety" (230 F. 2d, at p. 165).

In the instant case the fact was established that the Board had "duly certified that all of the items included in the application for a Necessity Certificate with respect to the Tidd project were necessary in the interest of national defense".

To this the Government replied (p. 3):

> The [Ohio Power Co.] asserts (pp. 15-22) that there is no conflict to be resolved by this Court, it being contended that the decision of the Second Circuit in *Commissioner v. National Lead Co.*, 230 F. 2d 161, is distinguishable since the necessity certificates for less than 100 percent which were issued in that case might have reflected an administrative determination that the entire facilities were not necessary to the national defense, while here the certificates were issued for less than 100 percent because the facilities possessed a post-war utility.
>
> *Actually, the certificates which were issued in both cases appear to be identical. And, in National Lead, both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 percent of cost only because of the policy of the administrative agency to reflect post-war use.* (Govt. Br. 5-6; Pet. Br. 2.) *Neither side even suggested that there was any difference between that case and this one.* (Emphasis supplied.)

Again, in the petition for a writ of certiorari in this case, No. 988, last Term, the taxpayer urged that the petition be granted because the decision below and the decision of the Court of Claims in the *Ohio Power* and *Allen-Bradley* cases were in conflict. After indicating that "it might be suggested that a distinction is to be found" (p. 7) we urged (p. 8):

> But whatever the niceties, if there be any, it is not meet that the result under a statute of the United States should differ *in identical circumstances* and should depend, yea or nay, upon the court before which the question happens to arise. (Emphasis supplied.)

We also said in our petition (pp. 5, 6):

> The Court [below] expressed disagreement with the reasoning in *Wickes* and interpreted the certificates as certifying the facilities as being only partially necessary to the national defense—i.e., only to the extent of the specified percentages of their costs—thus completely ignoring the finding of the Tax Court, adopting the stipulation of fact between the parties which the Commissioner summarized in his main brief below, p. 4, as follows:
>
> > All these partial certificates were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use.[1]

[1] In its main brief below (p. 1) the taxpayer stated that it took "no issue" with the Commissioner's statement of the case. It is thus without warrant that it was asserted in the brief of The Ohio Power Company submitted in opposition to the Government's motion in *United States* v. *The Ohio Power Company*, No. 312, p. 17, that "[t]he record in *National Lead* fails to show what the percentages in those certificates represented"; i.e., excess capacity over that necessary to national defense or notwithstanding that the whole of the facility was found necessary to national defense, excess of wartime cost over peace-time cost where post-war use was reasonably anticipated. *Id.* pp. 15, 16. See Gov't Rep. Br. in No. 312, p. 3.

The Commissioner replied (p. 1):

> For the reasons stated in the petition for a writ of certiorari * * * we agree with the taxpayer that the ruling of the court below presents a clear and direct conflict in decisions * * *. See also the Government's petition for a writ of certiorari, petition for rehearing and motion for leave to file a second petition for rehearing in * * * *Ohio Power Company*, No. 312, this Term * * *.

In opposing the Government's petition for a writ of certiorari in *Allen-Bradley,* No. 923, last Term, the respondent in that case attempted to distinguish it from this case in the same way as had been tried in *Ohio Power,* but the Government replied (pp. 1-2):

> The brief in opposition filed by the taxpayer erroneously asserts (pp. 9-10) that the decision of the Court of Claims in this case is not in conflict with that of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.,* 230 F. 2d 161, in which a petition for certiorari (No. 988) has been filed and the Government does not oppose review.
>
> The ground on which the taxpayer attempts to distinguish *National Lead* is that in that case (p. 9) "the facilities in question were never certified as being necessary in the interest of national defense in their entirety", while here, it is asserted (pp. 2-4, 5-7), the facilities were certified as being necessary in their entirety, although the certificates embraced only a percentage of the cost of the facilities. * * *
>
> Any claim that the certificates involved in *National Lead* were different from those involved here is plainly without basis in fact.

In its current brief in *Allen-Bradley,* No. 78, this Term (which the Commissioner embraces as his own, Resp. B. 12), the Government says (Govt. B. 22, 23, n. 11):

> It was alleged and admitted that the language contained in the * * * necessity certificates involved in this case was almost identical to the language contained in the certificates * * * issued to the taxpayer in * * * *Wickes Corp.* v. *United States,* 108 F. Supp. 616 * * * upon which case the court below relied * * *. Accordingly we have in-

cluded in Appendix B to this brief an excerpt from the record in the *Wickes* case, consisting of an affidavit of Sidney T. Thomas * * * explaining the policy of the certifying agency * * *.

> This affidavit is part of the record in the case of *National Lead Co.* v. *Commissioner*, No. 124, present term, * * * *in which the identical issue is involved.* (Emphasis supplied.)

and, further, that (Govt. B. 3, 4):

> In each instance the duly designated certifying authority determined that facilities described in taxpayer's application were necessary in the interest of national defense; however, in three instances the certifying authority certified that only part of the cost of such facilities was necessary for the national defense. The issuance of these certificates for less than 100% of cost was in accordance with an established policy not to permit deductions for accelerated amortization of the entire cost of facilities which were determined to possess post-war utility.

Yet, now, the Commissioner would pick up (Resp. B. 17-22) *Ohio Power's* old argument, which the Government so completely demolished, discredited, and disavowed, and would urge that it was *stipulated* that the Board did not determine that the facilities here involved were necessary in their entirety in the interest of national defense.[21] And this is in the face of

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[21] The Commissioner's argument at Resp. B. 20, n. 6, is somewhat obscure. But, if he means that there is a distinction between "necessary to the war effort" and "necessary in the national defense", and that the latter is a more stringent test, he is clearly wrong. Moreover, that the Board was "expressly concerned with the Government's monetary interest" cannot alter the fact that under its own procedures *no* certificate, partial or otherwise, would issue unless the facility were first found to be essential. See our main brief, pp. 25-28.

the Commissioner's assertions below (see our main brief, pp. 7, 25) that the partial certifications in this case were bottomed solely on the presumed post-war utility of the facilities. Like Alice, we can only cry, "Curiouser and curiouser".

The Commissioner's answer (Resp. B. 17-27 at 22) to our argument (see our main brief, pp. 52-56) that in finding that the Board did not certify the facilities involved to be necessary in their entirety, the Court below improperly substituted a finding of its own for a contrary finding of the Tax Court, would confuse that issue with whether by reason of the failure of the Commissioner to plead any affirmative defenses (see our main brief, pp. 22-24, 58-59) any question of waiver, estoppel, or collateral attack could be considered. In any event, the Commissioner maintains (Resp. B. 22, 23) that the "precise issue" was before the Tax Court on the pleadings and was (Resp. B. 22)

> Whether the taxpayer was entitled to amortize its full cost or only the percentage of cost certified by the Board * * *.

With this statement of the issue before the Tax Court, the taxpayer wholly agrees. But this is not to say that the premise on which that issue was presented to the Tax Court was *not* that (Govt. B. 3, 4) the Board had "determined that [the] facilities * * * were necessary" but had issued its certificates in a form calculated "not to permit deductions * * * of the entire cost of facilities which were determined to possess post-war utility". In other words, the narrow issue before the Tax Court was whether under section 124 of the Internal Revenue Code of 1939, the Board

had authority to limit to less than full cost, the amount amortizable with respect to a facility concededly determined to be necessary in the interest of national defense, but having post-war usefulness.

Nor is the Commissioner aided by his argument in the Tax Court, in which he said (Resp. B. 23) that the Tax Court:

> could not grant amortization in excess of the percentage of costs certified by the Board for, otherwise, it would improperly be exercising the discretion entrusted to the Board.[22]

The taxpayer does not dispute the proposition that the Tax Court could not exercise the discretion entrusted to the Board. Obviously, the Tax Court could not determine whether or not a facility was necessary. But this is not to say that the Tax Court could not find that the Board had or had not determined that a facility was necessary, in whole or in part; or that the Tax Court could not determine whether under the statute the Board had authority to limit amortization to the war-induced costs of a facility it had found to be necessary but to have post-war utility.

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[22] The Commissioner quotes (Resp. B. 23) the following passage from his brief in the Tax Court:

> The Board, in fact, determined that only certain percentages * * * of petitioner's total costs of new facilities represented the excess war costs, and there is no evidence before this Court upon which different percentages could possibly be computed, whether or not such computations were within the province of the Court.

Obviously, it was the Commissioner's theory, in the Tax Court, that his case rested on the effect to be given to the Board's determination as to excess war cost, and not upon either any deficiency in the determination of necessity, or any affirmative defense.

POINT IV

IN CONTENDING THAT THE ISSUE HERE CANNOT BE DECIDED BY THE TAX COURT OR THE COURT OF CLAIMS, THE COMMISSIONER REPUDIATES THE WELL-SETTLED RULE, UPON WHICH THE GOVERNMENT CHIEFLY RELIED IN THE *GRAPHITE* CASE, THAT EXECUTIVE DISCRETION CANNOT BE CONTROLLED BY MANDAMUS.

The Commissioner says that instead of accepting the certificates involved in this case "without challenge" (which has no foundation in the record), the taxpayer should have (Resp. B. 26)

> * * * questioned the authority of the Board to issue partial certificates, by instituting prompt and appropriate proceedings in a court of competent jurisdiction * * *.

The Commissioner also puts it this way (Govt. B. 49):

> * * * although the statute here involved did not explicitly provide for a method of reviewing the actions of the certifying agency, this would not have precluded the taxpayer from seeking judicial review of the allegedly unlawful denial to it of a 100% certificate. * * * Indeed, the Court of Appeals for the District of Columbia Circuit in the *Graphite* case, * * * although not agreeing with the contention that the certifying agency lacked statutory authority to issue less than 100% certificates, *did not deny its power to review,* in an appropriate proceeding, the actions of that agency. (Emphasis supplied.)

What did the Court of Appeals for the District of Columbia do in the *Graphite* case, 176 F. (2d) 868 (1949), aff'g 71 Fed. Supp. 944 (1947)? It merely affirmed, *per curiam,* "on the opinion of Judge Pine in the District Court", with Judge Wilbur K. Miller

dissenting,[23] the refusal of the District Court to issue a writ of mandamus. So it is what Judge Pine did, and said, that we must examine to determine whether the District of Columbia courts "did not deny" the power to review. Judge Pine said (71 F. Supp. at p. 946):

> * * * defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.

and

> Certification under this statute, as implemented by this regulation, clearly involved an exercise of discretion, which will not be set aside unless unreasonable, arbitrary or capricious.

For these propositions, Judge Pine cited a group of cases, headed by *Adams* v. *Nagle*, 303 U.S. 532 (1938), and *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U.S. 206 (1930), which had been relied upon by the Government in support of its argument that mandamus or injunction will not lie to control executive discretion, and upon which we rely. See our main brief, pp. 15-21. The Government had argued, in the memorandum it

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[23] The Commissioner notes (Govt. B. 30, n. 13) that Judge Clark, of the Court of Appeals for the District of Columbia, who joined in this affirmance, had been a member of the Senate Finance Committee in 1940 when that Committee considered the legislation which was enacted as section 124 of the Internal Revenue Code of 1939. The Commissioner fails to note that the amortization proposal had no more vigorous and vocal opponent in Congress than Senator Clark. (See Joint Hearings before Committee on Ways and Means and Committee on Finance, 76th Cong., 3d Sess., Aug. 9-14, 1940, p. 92; *id.*, pp. 161-2; Hearings before the Committee on Finance, 76th Cong., 3d Sess., Sept. 3-5, 1940, pp. 146, 167-8. See also petition for writ of certiorari, and brief in support thereof, in *U. S. Graphite Co.* v. *Sawyer*, No. 532, October Term, 1949, pp. 40-46).

submitted to Judge Pine in support of its motion to dismiss the complaint (p. 21):

> It must be remembered that what is here involved is an action for mandatory injunction.[1] Accordingly, there is brought into play the firmly established rule that decisions of administrative officers, where they involve an exercise of discretion and insofar as they are not unreasonable or plainly wrong, will not be reversed or set aside by process in the nature of mandamus. This rule has been consistently applied for well over a century. There is no need to multiply authorities on this point.* * *
>
> [1] The mandatory injunction here sought is in substance and effect the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations. * * *

In resisting the *Graphite* appeal in the Court of Appeals for the District of Columbia, the Government's brief made precisely the same point, in precisely the same words, and relied upon precisely the same authorities (pp. 29, 30). Its brief went on (p. 31):

> Even assuming that the construction of the statute by the executive is erroneous, "Since the earliest cases, it has been held that where an officer's action involves the exercise of his discretion in the construction and interpretation of a statute, mandamus will not issue to compel him to act upon one construction rather than another." * * *
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> * * *
>
> In upholding or refusing to interfere with the executive's construction of the law, the Court need not be absolutely satisfied that the construction is correct, but only that such an interpretation of the statute was a reasonable and possible one. * * *

The Graphite Co. sought review of the decision of the Court of Appeals for the District of Columbia by

a petition to this Court for a writ of certiorari, No. 532, October Term, 1949. In its brief in opposition to the petition, the Government said (pp. 15, 16):

> Even if his construction of the statute be erroneous, mandamus will not issue to compel the administrative official to act upon one construction rather than another. The interpretation need only be reasonable. "Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction."[24]

We believe that the foregoing passages from the Government's briefs in the *Graphite* cases properly state the law, and, indeed, we have so stated it.[25] Certainly, whatever else may depend on it, legal principle cannot depend on whose ox is being gored.

CONCLUSION

In our main brief we said (p. 47) that the Congressional purpose to predetermine by statute the amount amortizable with respect to a certified facility was so manifestly clear that the question arises as to how and why the contrary can be urged, and we suggested that the answer lay in an attempt to equate post-war hindsight with pre-war foresight.[26] We return to that for our closing theme.

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[24] Here the Government cited *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324-325 (1903); *Work* v. *Rives*, 267 U.S. 175, 183 (1925); and *Adams* v. *Nagle*, 303 U.S. 532, 542 (1938), upon which we also rely. See our main brief, pp. 18-22.

[25] See our main brief, pp. 15-22.

[26] See our main brief, pp. 47-52.

It is to be remembered that when the Second Revenue Act of 1940 was enacted, economic conditions were not what they have since become. Thus, no less an authority on the subject than former President Hoover, pointing to American Federation of Labor figures of 10,656,000 unemployed in January 1940, as against 12,300,000 unemployed in July 1932, the low point of the depression, and to the Federal Security Agency's estimates of 16,908,000 persons on relief in 1940, as against 16,620,000 in 1932, has written[27] that

> The Great Depression extended from 1929 to 1941 * * *. After January, 1940, war production and large mobilization for the armed forces began to have some effect; but even at Pearl Harbor (December, 1941), more than 8,000,000 were still unemployed.

It is also to be remembered that many, including the late President Roosevelt, believed that the depression had been caused in large part by an overexpansion of American industry's productive capacity.[28] On July 2, 1932, he said:[29]

> In the years before 1929 * * * this country had completed a vast cycle of building and inflation; for ten years we expanded on the theory of repairing the wastes of the War, but actually expanding far beyond that, and also beyond our natural and normal growth. * * * there was little or no drop in * * * prices * * * although * * * the cost of production fell very greatly; corporate

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[27] 3 Herbert Hoover, *Memoirs—The Great Depression, 1929-1941* (1952), 471-473.

[28] Id., 243.

[29] 1 Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt* (1938), 650, 651.

> profit * * * was enormous * * *. Very little of it went into increased wages * * * and by no means an adequate proportion was even paid out in dividends * * *. * * * Enormous corporate surpluses piled up * * *. Where * * * did those surpluses go? * * * Why, they went chiefly in two directions: first, into new and unnecessary plants which now stand stark and idle * * *.

Again, on August 20, 1932, he said:[30]

> * * * the forced production of our industry was far too great for our domestic markets.

And again, on September 23, 1932, he said:[31]

> Our industrial plant is built; the problem just now is whether under existing conditions it is not overbuilt. * * * A mere builder of more industrial plants * * * is as likely to be a danger as a help. * * * Our task now is not * * * necessarily producing more goods. It is the soberer, less dramatic business of administering * * * plants already in hand, of seeking to reestablish foreign markets for our surplus production, of meeting the problem of underconsumption, of adjusting production to consumption * * *.

It is no wonder, then, that in 1940 American industry was unwilling to take the risk involved in further expanding its productive capacity, for once the emergency was behind us, was it not reasonable to assume that conditions would revert to the *status quo ante*?

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[30] Id., 672.

[31] Id., 750-752. See also id., 783, 785.

Indeed, as late as the Winter of 1944 and the Fall of 1945 responsible Congressional committees felt that there was serious danger of just that happening. See our main brief, pp. 51, 52.

The view, prevalent in 1940, that American industry's capacity to produce was already greater than the ability of the available markets normally to consume, had not only responsible opinion but also bitter experience to support it. And, this is the context in which the amortization provisions of the Second Revenue Act of 1940 and the illuminating statement of the Committee on Ways and Means in reporting them favorably must be read. The Committee said:[32]

> *To obtain the needed facilities will require the investment of hundreds of millions of dollars. Your committee has been informed by the Advisory Commission to the Council of National Defense that substantial amounts of private capital will not be invested in * * * such facilities unless corporations are assured, in view of the fact that such facilities will be of use chiefly only during the period of national emergency, that they will be permitted to amortize the cost thereof over a shorter period than would be permitted under the depreciation provisions * * *.* (Emphasis supplied.)

[32] H. Rept. No. 2894, 76th Cong., 3d Sess., p. 16, quoted at p. 50 of our main brief. For an almost identical statement, see Randolph E. Paul, *op. cit. supra*, n. 18, p. 25, at 262.

The decision of the Court below frustrates the clear Congressional purpose. It should be reversed.

Respectfully submitted,

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